No. 87-703

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the attachment of certain of petitioner's assets by a civil litigant deprived petitioner of the effective assistance of counsel, where he was represented by his chosen retained counsel at every stage of his trial and where he made no complaint at any stage that he needed those assets to present an effective defense.

2. Whether petitioner is entitled to seek the return of seized property under Fed. R. Crim. P. 41(e) after he no longer has a legal ownership interest in that property.

3. Whether petitioner was unlawfully extradited from Switzerland.

4. Whether the district court properly ordered petitioner to pay restitution to a defrauded victim who was named in the indictment, specified in the jury instructions, and whose loss from petitioner's fraud was clearly demonstrated at trial.

5. Whether the district court abused its discretion in conditioning petitioner's probation on his agreement not to leave the United States until the court's restitution order was satisfied.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-24a) is reported at 814 F.2d 1329. The court's amendments to its opinion (Pet. App. 1a-5a) are reported at 827 F.2d 424.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1987, and amended on September 3, 1987. A petition for rehearing was denied on September 3, 1987. The petition for a writ of certiorari was filed on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of interstate transportation of a person in the execution of a scheme to defraud that person, in violation of 18 U.S.C. 2314 (Count One), and wire fraud, in violation of 18

U.S.C. 1343 (Count Two). The district court sentenced petitioner to imprisonment for a year and a day, to be followed by a term of five years' probation. The court also fined petitioner a total of $11,000 and ordered him to pay restitution of $34,501.26 and $458,373.89, respectively, to two of his victims. The court of appeals affirmed (Pet. App. 1a-24a).

1. Petitioner is a Belgian citizen. Between 1979 and 1981, he participated with two American citizens in a scheme to defraud a Belgian stockbroker and a Belgian corporation of $3.6 million (Pet. App. 7a). Petitioner and his two American accomplices, Alan Blair and Gerald Bilton, falsely represented that they owned the property on which an apartment complex near Kansas City, Missouri was built (Gov't C.A. Br. 4-7, 8-9). In reliance on that representation, the stockbroker, Roger Biard, lent petitioner $1 million to finance the renovation and conversion of the property to condominiums. The owners of the corporation, the Vanden Stock family, agreed to buy the renovated property for $11.5 million. The family paid $1.2 million of that amount in early installments (*id.* at 5, 10). Petitioner used the initial receipts from the Vanden Stock family to make two payments on the Biard loan, but he defaulted on the final $800,000 that was due (*id.* at 6-7). Meanwhile, the Vanden Stock family became concerned about its investment and sought to renegotiate the conditions under which it could terminate its purchase agreement; Blair received approximately $1.4 million for entering into an amended agreement with the Vanden Stock family (*id.* at 10-11). Petitioner and Blair later refused a demand by the Vanden Stock family that their money be refunded to them (*id.* at 11).

Petitioner, Blair, and Bilton were indicted in October 1984 for wire fraud, interstate transportation of a victim of fraud, and conspiracy to commit fraud (Pet. App. 7a-8a). Because petitioner resides in Belgium and because

Belgium does not extradite its nationals, the Justice Department initially could not proceed against him (*id.* at 8a n.1). When the Justice Department later learned that petitioner would be traveling to Geneva, Switzerland, on a brief business trip, however, the Department filed a provisional arrest request with Swiss authorities, pursuant to Article VI of the Treaty on Extradition, May 14, 1900, between the United States and Switzerland, 31 Stat. 1931.

Swiss authorities arrested petitioner in Geneva on January 14, 1985, as he stepped off his plane (Pet. App. 8a). In addition, the Swiss authorities seized two stock certificates that petitioner had been keeping in his Swiss accounts, based on the Justice Department's representation that it had probable cause to believe the certificates either were acquired by means of the fraud or would serve to prove the offense (*ibid.*). In March 1985, the Department of State filed a formal request for petitioner's extradition (*ibid.*).

Petitioner raised a challenge in the Swiss courts both to his extradition and to the seizure of his stock certificates (Pet. App. 8a-9a). On September 25, 1985, the Swiss Federal Tribunal, Switzerland's highest court, ordered that petitioner be extradited on the substantive charges of wire fraud and interstate transportation of a victim of fraud, and that the stock certificates be transmitted to the United States; the court declined to approve extradition on a conspiracy count. The Swiss court ruled as follows (No. A214/85, at 11-14 (official American Embassy translation)):

> (a) According to the extradition request, the petitioner is charged with having acted in concert with at least two American nationals to defraud certain Belgian financiers of a total of $3.6 million by falsely representing a real estate transaction which he was obviously in no position to carry out. Such facts constitute a fraudulent scheme to obtain money or other property by false pretenses, as defined in Article II,

Paragraph (6) of the Treaty. If committed in Switzerland, they would clearly fall within the scope of Section 148 of the Swiss Penal Code prohibiting fraud.

However, based on the statutes or the legal basis of such charge cited in the request for extradition, the petitioner claims that the Requesting State does not intend to punish him for fraud, but merely for having misused interstate communication facilities in the commission of such offense. This argument is invalid in that it fails to take into account the specificities of United States material criminal law, of the U.S. federalist system and of the separation of powers between federal law enforcement authorities and those of each State making up the Union.

* * * * *

Thus, contrary to the argument expressed by the petitioner in the appeal, the aim of the two main statutes cited in the extradition request is to punish fraudulent acts as defined by Section 148 of the Penal Code. The fact that the extraditable person used interstate communication or transportation facilities is invoked essentially as justification for the application of federal legislation and the jurisdiction of the federal authorities. In other words, if the scheme to defraud had been carried out strictly within the territorial boundaries of any given state, the perpetrator would be subject to the penalties contemplated under the laws of that state and such act would fall within the jurisdiction of the state law enforcement authorities. * * * Thus, the statutes merely set forth the conditions governing the punishment of the offense in question within the Requesting State, which in no way affect the obligation of the Requested State to lend assistance in such matter, so long as the facts

> charged are punishable under the laws of both States as required by Article II of the Treaty.

Petitioner was extradited the next day (Pet. App. 9a).

2. Before the stock certificates arrived in the United States, petitioner moved in the district court for their return, pursuant to Fed. R. Crim. P. 41(e) (Pet. App. 9a). The district court preliminarily denied petitioner's motion on October 28, 1985, and instead ordered that the certificates be held "pending litigation of this matter or further order of the Court" (Nov. 12, 1985 Tr. 20; Pet. App. 9a). The certificates arrived in the United States sometime between October 28, 1985, and November 12, 1985, and were deposited with the clerk of the court (Nov. 12, 1985 Tr. 11).

On November 12, 1985, the court held another hearing on petitioner's Rule 41(e) motion (Nov. 12, 1985 Tr. 11-12). At that time, the court was informed that a civil suit had been filed against petitioner in the district court, that the plaintiffs in that civil action were seeking a writ of attachment against the Swiss certificates, and that their request for a writ of attachment was scheduled for argument before a magistrate later that afternoon (*id.* at 14, 16). Petitioner agreed that the outcome of the attachment proceeding was relevant to the court's decision on the Rule 41(e) motion, because he was "not asking [the court] to order that it go back to [him]" (*id.* at 24; see also *id.* at 25-26), and because his Rule 41(e) motion would no longer matter if a writ of attachment was issued in the civil case (*id.* at 28). The district court accordingly denied the motion pending a decision in the civil action on the application for a writ of attachment (*id.* at 27, 35-36). Later that day, the magistrate assigned to the civil proceeding entered an order attaching the seized assets, which were then deposited in the registry of the court in connection with the civil case.

3. The case against petitioner, Blair, and Bilton went to trial on November 19, 1985 (Pet. App. 9a). The jury

found all three defendants guilty on the two substantive counts, and the district court entered judgment for the government on January 22, 1986 (*id.* at 10a). At that time, the court sentenced petitioner to a $10,000 fine and imprisonment for a year and a day on the first count, crediting him for the 373 days that he had already served in pretrial confinement, and to a $1,000 fine and a five-year probation term on the second count (*ibid.*). As conditions of probation on the second count, the court ordered petitioner (1) to pay restitution of $34,501.26 to Biard and $458,373.89 to Roger Vanden Stock, a member of the Vanden Stock family; (2) not to engage in any real estate transactions, except to liquidate his property, or any wire transfers, except to his family; and (3) not to leave the United States until the restitution had been paid (*ibid.*). Finally, on motion by the government and petitioner, the district court released the stock certificates into the joint custody of the government and petitioner's counsel for purposes of liquidation and ordered that the excess above the amount due for restitution be redeposited with the registry of the court for attachment by the parties in the related civil action (*id.* at 11).

4. The court of appeals affirmed and remanded for modification of the terms of probation (Pet. App. 1a-24a). Initially, it rejected petitioner's argument that his extradition was improper because "the Treaty does not identify wire fraud and interstate transportation of a victim of fraud as extraditable offenses" (*id.* at 12a). The court noted that, while "[t]he Treaty does not expressly name these specific offenses," it does "include[] 'obtaining money or other property by false pretenses [and] receiving money * * * knowing the same to have been * * * fraudulently obtained' " (*ibid.* (quoting Treaty, art. II, para. 6, 31 Stat. 1930)). Applying well-settled principles of extradition law, the court of appeals deferred to the deci-

sion of Switzerland, the surrendering country, that the offenses charged in the indictment are offenses for which extradition is authorized by the Treaty (Pet. App. 12a-14a).

The court next rejected petitioner's argument that the district court erred in denying his motion under Fed. R. Crim. P. 41(e) for the return of the property that was seized from his Swiss accounts. The court noted that "the district court found, and [petitioner] admits, that he irrevocably transferred full title to the property to his own attorney and counsel for the United States, acting jointly, to satisfy his restitution condition" (Pet. App. 21a-22a). Moreover, it found that this transfer was made voluntarily (*id.* at 3a). The court noted that petitioner had "sought and willingly complied with the [transfer] order" in order that he might be permitted to leave the country and return to Belgium (*ibid.*). Accordingly, it concluded that, "[a]lthough [petitioner] remains the beneficial owner of the assests and any proceeds derived from their sale, he has not demonstrated entitlement to lawful possession of the assets [and] [r]eturn of the assets under Rule 41(e) is therefore inappropriate" (*id.* at 4a). The court declined to "express [a] view on whether the seizure was illegal" (*ibid.*), reasoning that "resolution of that question is unnecessary to the disposition of his Rule 41(e) challenge on appeal" (*id.* at 4a-5a).

The court also rejected petitioner's argument that he should not have been required to make restitution to Roger Vanden Stock (Pet. App. 23a). It noted that "the entire scheme to defraud Biard and the Vanden Stock family of 3.6 million dollars was alleged in the indictment counts for which [petitioner] was convicted" and that, "[b]y specifying the total amount alleged to have been fraudulently obtained in the indictment, 'the indictment gave [petitioner] fair notice of the damages the government intended to prove he caused his victims to suffer and placed a ceiling above which a restitution order would have been improper' " (*ibid.* (citation omitted)). The court

thus concluded that "[i]t was not improper * * * to impose restitution for both Biard and Vanden Stock" (*ibid.*).

Finally, the court of appeals remanded the case to the district court with instructions to consider modifying the conditions of petitioner's probation (Pet. App. 24a). The court noted that, in response to an earlier remand order, "the district court [had] found that [petitioner's] continuing presence in this country no longer serves any probationary purpose" (*ibid.* (footnote omitted)). It thus concluded that petitioner's "probation may be modified to allow him to return to Belgium" (*ibid.*).

ARGUMENT

1. Petitioner initially contends (Pet. 10-16) that the seizure and retention of his stock certificates violated his Sixth Amendment right to effective assistance of counsel, because it allegedly interfered with his ability to defend against the criminal charges for which he was indicted. This contention has no merit and does not warrant review by this Court.

As a preliminary point, petitioner did not press this issue in the same fashion and on the same grounds as he has done in this Court. In seeking return of the stock certificates in the district court, petitioner did not suggest, other than in passing (R. 277uu, 277yy), that he needed the assets for his defense; counsel for petitioner subsequently disavowed that he was asking that the stock certificates be returned to petitioner (Nov. 12, 1985 Tr. 24-27). Moreover, petitioner did not complain during trial or in his motion for a new trial that the seizure and detention of his assets impaired his ability to present a defense. In the Ninth Circuit, he gave the issue only the slightest attention; his total discussion of the issue was contained in the third paragraph of a footnote in his brief. See Pet. C.A. Br. 27-28 n.40. And even then, petitioner did not suggest

that he had been denied the effective assistance of counsel, but rather that the government's alleged effort to *deny* him the effective assistance of counsel had failed because counsel had represented him in spite of the retention of the stock certificates. Nowhere in his brief did petitioner suggest that the retention of the certificates made it impossible to present his defense effectively. The Sixth Amendment claim that petitioner now seeks to raise is thus very different in character.[1] This Court should not consider what amounts to a new issue that petitioner has failed to litigate below. See *Youakim* v. *Miller,* 425 U.S. 231, 234-235 (1976); *United States* v. *Ortiz,* 422 U.S. 891, 898 (1975).

Even assuming that the Sixth Amendment question is properly before the Court, the petitioner errs in suggesting (Pet. 10-11) that the implicit approval of the seizure and retention of assets by the court below conflicts with the decisions of the Fourth and Fifth Circuits in *United States* v. *Harvey,* 814 F.2d 905 (4th Cir. 1987), and *United States* v. *Thier,* 801 F.2d 1463 (1986), modified, 809 F.2d 249 (5th Cir. 1987), respectively. *Harvey* and *Thier* are attorney-fee forfeiture cases in which the government, by asserting a priority claim over a defendant's assets, reduced through state action the defendant's access to funds for his defense.[2] In this case, by contrast, although the initial Swiss seizure followed a government request, the court retained the assets because private parties had sought to attach them to protect any future judgment they

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[1] For example, this is the first time that petitioner has asserted (Pet. 15 n.10) that he was unable to depose a defense witness because of insufficient funds.

[2] As petitioner acknowledges, the *Harvey* case is now pending before the en banc Fourth Circuit, which granted the government's petition for en banc review. The panel opinion in *Harvey* is therefore of no precedential value even within the Fourth Circuit.

might obtain against petitioner in their parallel civil action. Nothing in *Harvey* or *Thier* suggests that the Sixth Amendment restricts the ability of private parties to attach assets of a criminal defendant against whom the private parties are litigating.[3]

In any event, the record in this case makes it quite clear that petitioner has received the effective assistance of counsel and that no Sixth Amendment violation has occurred. Petitioner has been represented by counsel of his choice, lawyers from the law firm of Williams & Connolly, from the beginning of pretrial proceedings through the filing of the petition for a writ of certiorari in this Court. There is no basis in the record for suggesting that counsel's effectiveness has been diminished by the seizure and detention of the stock certificates. Thus, while a timely Sixth Amendment claim arguably would not be moot (*United States* v. *Harvey,* 814 F.2d at 929 n.11), it clearly would fail on the merits. See *United States* v. *Lewis,* 759 F.2d 1316, 1327 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States* v. *Rubio,* 404 F.2d 678, 681 (7th Cir. 1968), cert. denied, 394 U.S. 993 (1969); *United States* v. *Brodson,* 241 F.2d 107 (7th Cir.), cert. denied, 354 U.S. 911 (1957).

2. Petitioner next contends (Pet. 16-21) that the court of appeals erred in finding that he waived his claim under Rule 41(e) for return of property by ceding ownership of the stock certificates to his attorneys. This contention also has no merit.

Rule 41(e) (emphasis added) states that "[a] person ag-

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[3] The petition need not be held pending the disposition of *Van Cauwenberghe* v. *Biard,* cert. granted, No. 87-336 (Nov. 9, 1987). That case, which arises out of the separate civil action in which petitioner is involved, presents the questions whether an order denying a motion to dismiss on grounds of forum non conveniens is an immediately appealable order, and whether an order denying an extradited person's claim of absolute immunity from civil process is immediately appealable. The resolution of those questions would not affect the proper disposition of this case.

grieved by an unlawful search and seizure may move the district court for the district in which property was seized for the return of the property on the ground that *such person is entitled to lawful possession* of the property which was illegally seized." As noted by the court of appeals (Pet. App. 3a-4a), however, petitioner is not entitled to lawful possession of the property that he alleges was illegally seized; he ceded his ownership interest in the certificates to his attorneys in order that he might satisfy the terms of his probation and be allowed an early return to Belgium. Thus, under the plain terms of Rule 41(e), petitioner is not entitled to have the stock certificates returned to him, whether or not he was aggrieved by an unlawful search and seizure or other constitutional deprivation. Rule 41(e) does not entitle a person to have assets returned to him when the person is not lawfully entitled to possess those assets. See *Sovereign News Co.* v. *United States,* 690 F.2d 569, 577 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Francis,* 646 F.2d 251, 263 n.8 (6th Cir.), cert. denied, 454 U.S. 1082 (1981).

Moreover, contrary to petitioner's argument (Pet. 16-21), the court of appeals followed the correct path in declining to decide whether the initial seizure of the property was lawful. It may be, as petitioner asserts (Pet. 16-18), that any person with a legally cognizable interest in private property may prove in a civil action that property has been unconstitutionally seized and thereby obtain return of that property (or damages for its unlawful seizure). It may also be, as petitioner further asserts (Pet. 18-21), that a criminal defendant need not be entitled to lawful possession of property in order to prove that it was unconstitutionally seized and therefore should be excluded from evidence in his criminal trial. But this is not a civil action by petitioner for return of the property or for damages, and the government has not sought to introduce the stock certificates as evidence in this criminal case. Petitioner has merely sought to have the government return

the stock certificates to him pursuant to Rule 41(e). Entitlement to lawful possession of the property is a necessary condition for issuance of such an order under Rule 41(e), and the government has opposed the return of the property under that rule. Since petitioner is not entitled to lawful possession of the property, he is not entitled under Rule 41(e) to the relief he seeks. Accordingly, the court of appeals was correct in holding that resolution of the legality of the initial seizure was "unnecessary to the disposition of his Rule 41(e) challenge on appeal" (Pet. App. 5a). Accord *United States* v. *Francis,* 646 F.2d at 263 n.8.

3. Petitioner next claims (Pet. 22-27) that the court of appeals created a conflict among the circuits by holding that he could not raise the illegality of his extradition as a defense in his criminal trial. This claim misstates the conclusion of the court below.

The court of appeals did not hold that petitioner may not raise the illegality of his extradition as a defense in his criminal trial. Rather, it held that deference was due to the determination by Switzerland, the asylum country, that petitioner was charged with an offense covered by the Swiss-American extradition treaty. That holding is plainly correct. See *Johnson* v. *Browne,* 205 U.S. 309, 316 (1907); *McGann* v. *United States Bd. of Parole,* 488 F.2d 39, 40 (3d Cir. 1973), cert. denied, 416 U.S. 958 (1974).

None of the decisions that petitioner cites (Pet. 22-23) are to the contrary. Those decisions hold that, under the rule of "specialty," an accused may be tried only for the offense for which he was delivered up by the asylum country. See, *e.g., United States* v. *Rauscher,* 119 U.S. 407, 422-423 (1886); *United States* v. *Thirion,* 813 F.2d 146, 151 (8th Cir. 1987). That principle is not in any way of-

fended when, as here, a defendant is tried on the precise charges that were presented to the asylum country.[4]

Even without according any deference to the decision of the Swiss Federal Tribunal, it is clear that petitioner's extradition did not violate the treaty between Switzerland and the United States and therefore was not illegal. Article II, paragraph 6, of the Treaty permits extradition for obtaining money or other property by false pretenses (31 Stat. 1930; Pet. App. 48a). The indictment in the instant case, a copy of which was made available to the Swiss Federal Tribunal (along with the operative statutes of the United States), charges that petitioner obtained money and property by wire fraud and interstate transportation of a victim of fraud. In other words, the indictment alleges the kind of offense that is made unlawful in Switzerland and that is specifically included in the extradition treaty; the federal crime parallels the Swiss offense except for an additional element required only in federal prosecutions—the nexus with interstate commerce. But the absence of direct equivalency does not render the extradition unlawful. See *Collins* v. *Loisel,* 259 U.S. 309, 312 (1922); *Kelly* v. *Griffin,* 241 U.S. 6, 14 (1916); *Wright* v. *Henkel,* 190 U.S. 40, 58 (1903); *In re Extradition of Russell,* 789 F.2d 801, 803-804 (9th Cir. 1986); *Quinn* v. *Robinson,* 783 F.2d 776, 783 (9th Cir. 1986), cert. denied, No. 86-9 (Oct. 14, 1986); *Demjanjuk* v. *Petrovsky,* 776 F.2d 571, 579 (6th Cir. 1985), cert. denied, 475 U.S. 1016

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[4] *Shapiro* v. *Ferrandina,* 478 F.2d 894 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973), does not conflict with the decision below; the *Shapiro* case involved a request to extradite an individual from this country to another country, rather than vice versa. As a tribunal of the asylum country, the court in *Shapiro* therefore engaged in a close analysis of the question whether the offense charged in the foreign state was covered by the pertinent extradition treaty. That analysis would not have been necessary if this country had been the requesting country and a determination of extraditability had been made by a court of the asylum country.

(1986); *Messina* v. *United States,* 728 F.2d 77, 79 (2d Cir. 1984); *Cucuzzella* v. *Keliikoa,* 638 F.2d 105, 108 (9th Cir. 1981); *Brauch* v. *Raiche,* 618 F.2d 843, 850-851 (1st Cir. 1980).[5]

4. Petitioner next contends (Pet. 27-29) that the court of appeals erred in approving the award of restitution to Roger Vanden Stock. But that contention is based upon the false premise that Vanden Stock was simply a witness in this criminal case. In fact, the indictment clearly charges that Vanden Stock was a victim of fraud by petitioner. Thus, Count One of the indictment, paragraph 5, alleges that petitioner and his co-defendants "devised and intended to devise and employ a scheme and artifice to defraud Roger Biard and the Vanden Stock family (hereinafter victim investors) of approximately $3.6 million by means of false and fraudulent pretenses, representations and promises * * *." Paragraphs 6, 7, and 10 of Count One restate the total sum that was obtained from the "victim investors." Paragraph 8 sets forth the various misrepresentations made by petitioner; it includes allegations of misrepresentations to the Vanden Stock family. And the final jury instructions required the jury to find, for Count One, "each of the following elements beyond a reasonable doubt," including "that the defendant knowingly and willfully devised, intended to devise, or

[5] As petitioner asserts (Pet. 25-26), the Attorney General and the Secretary of State in 1933 were of the view that direct equivalency was required and, accordingly, that mail fraud and wire fraud were not extraditable offenses. But that view is no longer the official position of the government of either the United States or Switzerland. See *Government of the United States* v. *McCaffery*, [1984] 1 W.L.R. 867 (United States appealed successfully to the British House of Lords from magistrate order denying extradition for mail fraud on the ground that England has no equivalent jurisdictional element); Swiss Federal Tribunal, No. A 214/85 (Sept. 25, 1985), at 11-14 (the fact that United States has a federal system and includes an interstate commerce element in the definition of its crime out of respect for jurisdictional boundaries does not change equivalency of offenses).

joined a scheme or artifice to defraud or to obtain money by false pretenses or representations, specifically a scheme or artifice to defraud Roger Biard *and the Vanden Stock family* of approximately $3.6 million" (Tr. 3477 (emphasis added)).[6] Thus, the indictment and the jury instructions, as well as the evidence presented at trial, identified the members of the Vanden Stock family as defrauded victims, and petitioner clearly was convicted of defrauding them. Under these circumstances, it was entirely proper for the court to order that restitution be paid to Roger Vanden Stock. See *United States* v. *Sleight*, 808 F.2d 1012, 1018-1019 (3d Cir. 1987); *United States* v. *Woods*, 775 F.2d 82, 88 (3d Cir. 1985); *United States* v. *Whitney*, 785 F.2d 824, 826 (9th Cir. 1986).

5. Finally, petitioner claims (Pet. 29-30) that the district court lacked the authority to order him to remain in the United States until the restitution award was paid. The district court initially found that, because petitioner had transferred the stock certificates to his attorney and the government for purposes of paying the restitution judgment, "no further probationary purpose is to be served by retaining [petitioner] in the United States" (Pet. App. 37a-38a). That finding led the court of appeals to remand the case to the district court to consider modifying the terms of probation (*id.* at 24a). Petitioner advises that the district court on remand has made a new finding that the value of the stock certificates could decline before the award is satisfied and that petitioner's continued presence in the United States is therefore necessary to ensure final compliance with the restitution order (see Pet. 9).

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[6] As to Count Two, the court repeated the requirement that the jury find a scheme to defraud both Biard and Vanden Stock (Tr. 3482).

The court of appeals apparently has not had occasion to consider the most recent order by the district court. Petitioner therefore is in effect asking this Court to review the district court's order on remand without the benefit of court of appeals review of that order. Petitioner has given no reason to justify such an unusual exercise of this Court's certiorari jurisdiction and, for that reason alone, review of this issue is unwarranted.

In any event, even if the district court's order were properly before the Court, it would be lawful. The requirement that petitioner remain in this country until the restitution is paid is reasonably related to a legitimate purpose of the order of probation and is therefore within the sentencing court's discretion. *United States* v. *Koenig*, 813 F.2d 1044, 1047 (9th Cir. 1987); *Higdon* v. *United States*, 627 F.2d 893, 897 (9th Cir. 1980). Since the probation term is less onerous than the term of imprisonment the court could have imposed in its place, and since under a sentence of imprisonment petitioner could not have left the United States, it is difficult to understand how the requirement that petitioner remain in the United States as a condition of his probation could constitute a cruel and unusual punishment or a violation of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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